

REMARKS/ARGUMENTS

Claims 1-3, 5, 6, 8, 21, 22 and 25-32 remain pending in this application (hereinafter, the “373 Application”). All of the aforementioned claims stand rejected under 35 U.S.C. 102(b). Applicant submits that the following remarks address all of the issues raised in the Office Action of 28 November 2007. Headings presented below reflect the order of issues presented in the aforementioned Office Action.

1-2: Response to Amendment

Applicant thanks the Examiner for acknowledging entry of the claim amendments filed 15 August 2007.

3-4: New Rejections – Claim Rejections under 35 U.S.C. §102

Claims 1-3, 5, 6, 8, 21, 22 and 25-32 stand rejected under 35 U.S.C. 102(b), as being anticipated by U.S. Patent No. 5,323,652 (hereinafter, “Parker”). Applicant respectfully traverses the rejection of all of these claims.

Applicant initially traverses in its entirety the Section 102 rejection of all of claims 2, 3, 5, 6, 8, 21 and 22. Although the outstanding Office Action appears to reject these claims in the Summary, the body of the Office Action entirely fails to address or discuss a single one of the recited features or limitations from any one of these claims. The actual rejection addresses claim 1 only, and no other pending claim. As such, the rejection is deficient on its face with respect to every one of these dependent claims.

The only apparent basis in the Office Action for rejecting dependent claims 2, 3, 5, 6, 8, 21 and 22 appears to be their dependence on independent claim 1, which is the only claim substantively discussed in the Office Action. Dependence from a rejected claim though, by itself, does not warrant a rejection. Each claim is presumed to stand, and require examination, on its own merits. Only an objection to the dependent claim is valid. See Section 706.01 of the MPEP.

The same principle applies to the apparent rejection of independent claim 25. Although claim 25 shares several features in common with claim 1, the two claims are not identical, and the outstanding Office Action fails to discuss any feature in claim 25 that is not found in claim 1. Accordingly, the Office Action does not assert any valid basis for rejecting claim 25, nor its dependent claims 26-32.

Because independent claim 1 remains the only claim substantively discussed in the Office Action, Applicant further traverses the rejection of claim 1 as follows:

Independent claim 1: This claim recites a symbol-bearing receptacle for a fluid, including:

- (a) a container for the fluid; and
- (b) a transparent symbol disposed on the container, the symbol having a water reactivity that differs from water reactivity of the container,
- (c) *wherein the difference in water reactivities* renders the symbol visually distinct from the container when the container holds the fluid and when a temperature of the container is reduced to a condensation point.

In order to anticipate claim 1, Parker must teach each of the above claim elements (a)–(c), and “the identical invention must be shown in as complete detail as contained in the ... claim.” MPEP 2131 citing *Verdegaal Bros. V. Union Oil Co. of California*, 814 F.2d 628, 2 USPQ2d 1051 (Fed. Cir. 1987) and *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 9 USPQ2d 1913 (Fed. Cir. 1989). However, Parker fails to meet this requirement, and therefore cannot and does not anticipate claims 1 and 25.

For example, contrary to the Examiner's assertion, Parker fails to teach (or even suggest) claim element (b), a transparent symbol having a water reactivity that differs from water reactivity of a container that it is disposed upon. First, it should be noted that Parker does not disclose a symbol. For example, the passage asserted in support of a symbol in Parker (col. 3, lines 22-23) is silent as to a symbol. More particularly though, Parker entirely fails to disclose (or even suggest) a symbol having a different water reactivity from that of the container. The rejection even appears to concede this point.

For example, instead of pointing to any teaching (or suggestion) from the reference to support the assertion, the rejection merely states that Parker's non-disclosed "symbol" is "deemed to have a water reactivity that differs from water reactivity of the container, *since they are made of different material*, e.g., thermochromic material versus non-thermochromic material". (Office Action p. 2, final paragraph). No other rationale is anywhere presented to support the proposition that different materials *automatically* require the additional assumption of different water reactivities. In other words, although not actually declared on the record, the rejection has asserted either Official Notice or the theory of inherency for this presumption. The presumption, however, is completely unsupported by any actual evidence on the record, while also being factually untrue.

Because Parker is completely silent regarding water reactivity, for the rejection to have any merit, the Examiner is required to: (1) in the case of Official Notice, provide documentary evidence on the record that clearly teaches (or at least suggests) that every different material has a different respective water reactivity (MPEP §2144.03(C)); or (2) in the case of inherency, "provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the applied prior art." MPEP §2112 quoting *Ex parte Levy*, 17 USPQ2d 1461, 1464 (Bd. Pat. App. & Inter. 1990), emphasis in original. Neither can be provided in the present case, however, because it is known in the art that at least some different materials can have the same water reactivity (e.g., hydrophilic or hydrophobic). There is no evidence on the record in this case that materials having different thermochromic properties (e.g., as in Parker) will necessarily exhibit different water reactivities. Differing thermochromic properties merely require a different color reaction to a range of temperatures. Essentially, the rejection presumes that two materials having no other difference between them but their colors will as a necessity also have different water reactivities. This conclusion is unreasonable, and the rejection cannot be maintained.

Furthermore, the rejection is additionally deficient on its face with respect to claim element (c), above. In fact, the rejection does not even appear to have first considered all of the language of element (c), which is required of every *prima facie* rejection. No consideration appears to have been given to the fact that independent claim

1 requires that the featured symbol becomes visually distinct when both a fluid is held in the container and when the container temperature reaches the condensation point. In other words, the pending claims establish that the visual distinctness of the symbol requires both a water reactivity component and a temperature component. The rejection only ever addresses the temperature component. The rejection simply assumes that both features must be present if one of them is present. Such reasoning is highly improper.

It should still further be noted, with respect to the temperature component, that Parker relies on two different mechanisms to render the thermochromic materials visually distinct. Parker discloses that its thermochromic materials are layered on “a passive opaque backing layer 22 of a certain color or white” (Parker, col. 3, lines 13-14). This backing layer is in turn applied to Parker’s propane tank 14. Thus, unless the propane tank is the same color as the backing (and Parker does not teach or suggest that it is), the thermochromic materials are already visually distinct from the tank, even if they are in a transparent state, since:

“the line of sight of the viewer 23 would be through the transparent film, 16 through the thermochromic layers 18 and 20, when in a transparent state, to the passive opaque backing layer 22.” Parker col. 3, lines 20-23.

Assuming, for the purposes of this discussion only, in the case where Parker’s tank and passive backing layer are the same color, and thus not initially distinct from the start (again, Parker does not disclose such relationships between the components), Parker still does not teach (or suggest) a symbol (not recited) rendered visually distinct from a container by differing water reactivities (also not recited), when the container holds the fluid and a temperature of the container is reduced to a condensation point. Rather, Parker employs thermochromic materials that change color with temperature.

Parker recites that “the thermochromic layer 18 immediately adjacent the transparent film 16 may be black below its transition temperature of 27° C. and transparent above that transition temperature, and the thermochromic layer 20 more remote from the transparent film 16 may be magenta below its transition temperature of 35° C. and transparent above that transition temperature.” Parker col. 3, lines 53-60.

Parker therefore expressly teaches here that it is only temperature, and not water reactivity, that renders the thermochromic layers visible. In contrast, the '373 Application unambiguously recites that a difference in water reactivity is at least one required factor to render the symbol visually distinct from the container. See, e.g., page 5, paragraphs [0029]-[0030], page 6, paragraph [0033] and FIG. 4A.

For at least all these reasons, the Section 102 rejection of claim 1 (and therefore its dependent claims as well) is deficient, and should be withdrawn.

Independent claim 25: With respect to the same Section 102 rejection as applied to independent claim 25, the rejection is similarly deficient on its face for failing to consider and discuss any of the recited features of claim 25 that do not appear in claim 1. For example, claim 25 features additional detail regarding the container, namely, that an open fluid receptacle is formed of a base disposed upon a substrate, that a wall is affixed to and extends upwardly from the base, and that the transparent symbol is disposed on the base, facing the substrate. The rejection fails to even assert that Parker anywhere discloses (or even suggests) such additional features. Accordingly, the Section 102 rejection of claim 25 (and its dependent claims) is additionally deficient on its face for at least such reasons, and should be withdrawn.

Applicant further notes that among other claim 25 elements (see, e.g., arguments in support of claim 1, above), Parker nowhere recites or even suggests an open fluid receptacle. For example, Parker's thermochromic level indicator is described as being affixed to a propane tank. As is well known, propane tanks are not open fluid receptacles. They are closed, to prevent propane gas escaping the tank. Indeed, one questions the point of using Parker's thermochromic level indicator with an open receptacle (as recited in claim 25), since one can look inside an open receptacle to determine a level of material within. In describing the thermochromic level indicator, Parker itself touts the desirability of measuring "the volume or level of a material within a tank or other container without opening the container or weighing the container." Parker col. 1, lines 13-15. This appears to be the main point of Parker's patent.

Dependent Claims 2-3, 5-6, 8, 21-22, and 26-32: As discussed above, all of these dependent claims depend directly or indirectly from either of independent claims 1 and 25, and therefore contain all of the features of the respective base claim, plus additional features. Accordingly, all of these dependent claims should at least be in condition for allowance for any and all of the reasons discussed above with respect to the traversal of the rejection of claims 1 and 25. The rejection of these claims should be withdrawn for the same reasons.

The rejection of the dependent claims should still further be withdrawn because no consideration has been given in the Office Action to the subject matter of any individual dependent claim. The rejection entirely fails to substantively discuss the features of these claims, or to any portion from Parker that in any way supports a single rejection of these claims. It is highly inappropriate for the Examiner to force Applicant to try to guess at what the Examiner's reasons for rejecting the claims may have been, if there were any such reasons in the first place. If the Examiner intends to assert a rejection of any of the dependent claims based solely on Parker, the Examiner should be required to vacate the outstanding Office Action, and then file a corrected Office Action that resets the time for response. Otherwise, the Examiner would still have to file a corrected Office Action that indicates the allowability of the subject matter from all of these claims.

Applicant respectfully points out that "The examiner should never lose sight of the fact that *in every case* the applicant is entitled to a full and fair hearing, and that a clear issue between applicant and examiner should be developed, if possible, before appeal." See MPEP 706.07 (emphasis added). The failure of the outstanding Office Action to provide any basis for the rejections of all but one claim simply fails to provide Applicant his fair hearing, as well as the additionally important "development of clear issues" where there is no immediate agreement.

With respect to the individual dependent claims separately, the rejection is still deficient on its face.

For example, **claim 2** recites a hydrophilic symbol and a hydrophobic container. Parker recites no such things. In comparison, **claim 3** recites a hydrophobic symbol and

a hydrophilic container. Neither the word “hydrophilic” nor the word “hydrophobic” is even used in Parker. Moreover, claims 2 and 3 are opposites of one another. No rationale has been presented in the outstanding Office Action for how Parker could read upon both opposing configurations, when the reference is completely silent as to both.

Claim 5 features that the symbol also includes a plastic film. In contrast, **claim 6** recites that the symbol includes a silicone film. Parker, on the other hand, recites plastic use only for a carrier for a magnetic material, to stick opaque backing layer 22 to a propane tank. See Parker col. 5, line 67 - col. 7, line 10. This is different from a symbol including a plastic film. Silicone, as in claim 6, is never mentioned in Parker with respect to any element.

Claim 8 recites that the symbol is embedded in a surface of the container and Parker fails to teach (or even suggest) this feature. Parker’s thermochromic level indicator is expressly described with respect to application to a tank. See Parker col. 6, lines 4-6, 41-42. The rejection fails to cite any section of Parker as anticipating this claim feature. As with claims 2, 3 and 5, the office action does not discuss the features of claim 8.

Claim 21 recites that the container includes a confined passageway disposed within a surface of the container. A thorough examination of Parker reveals no such relevant features. **Claim 22** features that the passageway is configured for holding a coolant. Parker nowhere recites a passageway for holding a coolant, let alone a coolant itself.

Claim 26 recites that the symbol includes a pattern that develops on a surface supporting the base due to water condensation when the container holds a fluid and the temperature is reduced to the condensation point. Parker simply teaches no such elements. Parker fails to even suggest any kind of patterns formed by condensation. Parker merely utilizes temperature to change the color of layers of thermochromic material held within a envelope-like sticker, and thus fails to address anything similar to the subject matter of claim 26. A symbol pattern that develops on a surface supporting a container base is different from a thermochromic level indicator that is adhered directly to a tank.

Claim 27 recites that the base of the container has a material around the symbol that is dissimilar to material of the symbol. Parker does not discuss a base for its propane tank 14, nor any such composition thereof. Accordingly, claim 27 could not, by definition, be anticipated by Parker without at least some assertion that such features would be inherent to Parker's propane tank (an enclosed receptacle). Such an assertion, though, would not be reasonable.

The Office Action similarly fails to assert any substantive basis to reject **claim 28** or **claim 29**. These claims recite a hydrophilic symbol and hydrophobic surrounding material, and a hydrophobic symbol with hydrophilic surrounding material, respectively. Parker does not teach or suggest these claim features, and the rejection notably fails to even assert that such elements appear anywhere in Parker. See also the arguments in support of the patentability of claims 2 and 3, above.

Claim 30 features a plurality of base extensions elevating the substrate from a container base, and that one or more of these base extensions forms the symbol. This is simply not recited, or even suggested, in Parker. Notably, the rejection again fails to point to a single line or figure from Parker to support a rejection of this claim.

Claim 31 recites a confined passageway disposed within one or both of the container base and the container wall. Parker simply does not disclose (or suggest) such features, and Applicant again notes that the rejection does not assert that Parker anywhere does or could read upon these features.

Claim 32 further recites that the passageway is configured for holding a coolant, similar to claims 21 and 22, discussed above. Also similar to the discussion above, Parker nowhere discloses (or suggests) any such similar features, elements or configurations. The rejection is glaringly deficient on its face.

Applicant has demonstrated the significant deficiencies in the Office Action itself, as well how Parker fails to anticipate any of claims 1-3, 5, 6, 8, 21, 22, and 25-32. Accordingly, the withdrawal of the outstanding Section 102 rejection based on Parker, and allowance of all pending claims, are respectfully requested.

5: Answers to Applicant's Arguments

Applicant thanks the Examiner for the withdrawal of all of the previous rejections of record.

CONCLUSION

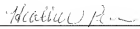
Applicant submits that the above remarks address each and every issue raised in the Office Action of 28 November 2007. Applicant accordingly solicits a Notice of Allowance for all of claims 1-3, 5, 6, 8, 21, 22 and 25-32.

This Response is timely filed within the three-month shortened statutory period for reply. Hence, no fees are believed due. However, should any fee be deemed necessary in connection with this Response, the Commissioner is authorized to please charge any such fees to Deposit Account No. 12-0600.

Should any issues remain outstanding, the Examiner is again encouraged to telephone Applicant's attorney, Curtis A. Vock, at (720) 931-3033.

Respectfully submitted,
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